

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON AT SEATTLE
3

4 MONEY MAILER, LLC,)
5) C15-1215-RSL
6 Plaintiff,) SEATTLE, WASHINGTON
7 v.) June 6, 2018
8 WADE G. BREWER,) Motion Hearing
9 Defendant.)

10 VERBATIM REPORT OF PROCEEDINGS
11 BEFORE THE HONORABLE ROBERT S. LASNIK
12 UNITED STATES DISTRICT JUDGE

13
14 APPEARANCES:

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16
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1 THE CLERK: Case C15-1215-L, Money Mailer versus Wade
2 Brewer. Counsel, please make your appearances.

3 MR. ALEXANDER: Nathan Alexander with Dorsey Whitney
4 on behalf of plaintiff and counterclaim defendants, Money
5 Mailer Franchise Corp., and Money Mailer LLC. I am joined at
6 counsel table, and it's my pleasure to introduce you to Joe
7 Craciun from Money Mailer, general counsel.

8 THE COURT: Great. Thanks very much.

9 MR. BROWN: Your Honor, Daniel Brown on behalf of
10 Mr. Brewer. Mr. Brewer is here today in the audience. On my
11 right is Mr. Velloth and Mr. Rosenberg of my office.

12 THE COURT: Thank you.

13 Mr. Rosenberg, you changed law firms.

14 MR. ROSENBERG: I did, Your Honor.

15 THE COURT: It's good to see you. Still on that side
16 of the table?

17 MR. ROSENBERG: I'd get lost over there.

18 THE COURT: Yeah. Absolutely.

19 Mr. Rosenberg, in his previous life, was in a firm that
20 would appear in federal court quite a bit. And then one of
21 my truly landmark cases, *Wilbur v. Mount Vernon*, which is --
22 I told my career law clerk L.B., this is one that would be
23 sort of tombstone material for how important it was and how
24 novel it was. And Mr. Rosenberg did a very nice job for his
25 client, the cities of Mount Vernon and Burlington. But you

1 were on the losing end of the case.

2 But the cities accepted the ruling, didn't appeal, and
3 actually used it for a wake-up call for the fact that they
4 were not providing indigent defense systems that they should
5 have been, and even sort of proselytized to other cities in
6 the State of Washington: Don't get caught like we did, kind
7 of asleep, and upgrade your indigent defense system. So it
8 really was a win/win in that sense. Don't you think, Adam?

9 MR. ROSENBERG: If you're going to lose, it's good to
10 lose and makes society a little bit better.

11 THE COURT: A better place. Good enough.

12 Well, we are here on Mr. Brewer's motion for partial
13 summary judgment. And I take it, Mr. Brown, you'll be making
14 the argument?

15 MR. BROWN: I will. Ready, Your Honor?

16 THE COURT: Very ready, yes.

17 MR. BROWN: Just feel free to jump in with any
18 questions that you have, Your Honor. I know you're not shy
19 about that.

20 THE COURT: Right.

21 MR. BROWN: You know, reading this again yesterday,
22 as I did before the hearing just to get prepared, it almost
23 felt like the peerless from law school. It's like the two
24 briefs passing in the night. And I kept saying, why is that?
25 And I realize it's because half of Money Mailer's brief on

1 their facts, which is about half of it, doesn't address the
2 facts that are at issue for this motion, at all.

3 Mr. Carr's declaration admits, in the smallest way
4 possible, that there were markups made. But, you know, they
5 don't want to talk about the amounts. So what we have here
6 is a few admissions and a ton of non-denials, which are
7 admissions for purposes of summary judgment. And I want to
8 go over a few of those, Judge, with you right now.

9 THE COURT: Okay.

10 MR. BROWN: They do admit that they marked up the
11 printing costs. And they admit something that we suspected
12 but we still don't know in discovery, which they may have
13 marked up a little, they say, other fixed costs; which is
14 like being a little pregnant. And that's a problem under
15 FIPA, Your Honor. So we've got a new admission that they've
16 got other problems.

17 They don't deny that the markups on the printing were
18 somewhere between 110 percent -- I'm rounding the number,
19 Your Honor -- up to 150 percent, at times. They don't deny
20 that there was a kickback, which is violative of the
21 anti-kickback provisions of FIPA, from trying to offset
22 printing, in third-party printing. They don't deny that.
23 But we provided the actual contract that we did get in
24 discovery, that actually calls it out that there's going to
25 be a rebate.

1 They don't deny that they told franchisees, like
2 Mr. Brewer, that they were able to get the most advantageous
3 printing from a party like Trend Offset because of their
4 economic might. You know, we've got, what did they say, 175
5 franchisees in 35 states, and we went out and got the best
6 deal possible.

7 They also don't deny that they never told Mr. Brewer that
8 they were marking up those printing costs between 110 percent
9 plus, or on the other charges as Mr. Carr has admitted.

10 They don't deny that they ever told Mr. Brewer there was
11 any markup at all. They never said that.

12 THE COURT: But Mr. Brewer does not deny that they
13 told him what the costs would be?

14 MR. BROWN: Total costs, right. So, Your Honor, if
15 you say -- I like using analyses -- you're going to go buy
16 the pizza dough and the cost is going to be \$25 for the pizza
17 dough. Okay. But the cost is really only \$12 to us, and
18 we're marking it up another \$13. And that didn't get said.
19 And that's a problem. Because *Nelson*, Your Honor, actually
20 dealt with that issue. In *Nelson*, they told the franchisee,
21 hey, there's a markup in this price you're getting. And the
22 court said, that's not sufficient. They even told them
23 there's a markup. And they figured it out right away, it's a
24 20 percent markup. And the court said, no, you've got to
25 tell them all this before you enter into the contract, not

1 after the fact.

2 THE COURT: And you think this is something unique to
3 the Franchise Act? I mean, an ordinary contract, 20 percent
4 markup wouldn't necessarily be considered unconscionable,
5 would it?

6 MR. BROWN: No, because under the Franchise Act,
7 which is the whole idea if you look at the statutory history
8 -- and *Nelson* talks about it and the other cases -- it's
9 about maximizing disclosures, minimizing overreaching, and
10 trying to correct this grand overplay of power, right? We
11 have Money Mailer that's got all the information, all the
12 knowledge, all the experience. And they're selling -- it's
13 money in your mailbox, Your Honor, that's what they're
14 selling, right? That's their little tag-line is, "It's money
15 your mailbox." It's money in their mailbox.

16 THE COURT: And it goes right into my recycling.

17 MR. BROWN: It's a tough -- direct-mail marketing is
18 obviously tough.

19 THE COURT: Very tough.

20 MR. BROWN: It's really tough when you don't know
21 what you're paying for, and you think you're getting a good
22 deal. And you think, oh, yeah, they went out and got the
23 best price for me. And now we find out, actually more
24 information we didn't have, Your Honor. They're shoving
25 overhead into the printing costs. And the whole overhead for

1 the business they put into printing costs. And a little bit
2 somewhere else. We don't know where that is yet. Mr. Carr
3 doesn't give us the specifics, but we're going to find it.
4 They're putting it all there. They put the overhead there.

5 Now, if they try to divide it, like in *Nelson*, they tried
6 to make the argument: Well, let's use the costs, Your Honor,
7 of the materials. Then we're going to have a royalty fee.
8 Let's treat it that way. And the Supreme Court said: No,
9 you don't get to do that either.

10 But more importantly, they didn't do that. They said to
11 Mr. Brewer: Here's your costs, let's say it's \$50 a spot,
12 and we're going to charge you an extra \$50 for this super
13 secret proprietary process we have. Now, they did spend a
14 lot of pages, by my count about 19 times in the brief and the
15 declaration, about their proprietary costs.

16 If you know what it is, Your Honor, you're way ahead of me
17 on this game, because I still don't know what it is. It's
18 super secret. But they do say that they trained a vendor.
19 Well, we know who that vendor is. They trained Trend to do
20 all the stuff that's secret. But Trend is already charging
21 them for that. So I don't think Trend is charging them
22 twice. Trend is charging them for all that, all the stuff
23 Trend is doing. And then they slap on another 110 to
24 150 percent.

25 You know, they don't also deny that Mr. Brewer didn't know

1 about that kickback from Trend. And they don't deny that
2 they never told him about it. They don't deny that.

3 So the question is, what facts do we have to have to
4 establish a violation of FIPA? Well, we've got them.
5 There's undisclosed markup. That's it. End of story. Got
6 to disclose it.

7 And you kind of asked me if this was peculiar to the
8 Franchise Act, Your Honor. I think it's actually peculiar to
9 the franchise. And I always like to figure out why I think
10 something happened. I'm going to surmise here, but I'm going
11 to say what I think.

12 I think being in so many different jurisdictions, Money
13 Mailer FC, the franchise corp thought, we're going to set up
14 Money Mailer LLC, right? They're going to be the ones you
15 buy the services from. You're going to have a separate
16 contract -- which they never did, obviously, they're supposed
17 to -- and we're going to set it up where we charge a pretty
18 low royalty fee, and a pretty low franchise fee to begin
19 with. And that's going to be nice and low.

20 And then we're going to go ahead and put all of our
21 charges and all our overhead in the other company. And we're
22 not going to tell these guys about it, and they're going to
23 pay it, and they're going to think: Well, this is a pretty
24 good franchise, I don't have to pay a lot of royalty fees.
25 I'm getting this good printing deal, it's the best deal they

1 could find. That sounds like a good deal. And they don't
2 know about it. And they thought that was okay. Probably
3 because they are in too many states, Your Honor. Maybe it's
4 okay in other states. It's not okay in Washington. You have
5 to disclose.

6 And you know why I think this is the story? Because
7 earlier in this case -- you're not going to hear it today
8 because it's clear that MMLLC is also a person under the Act,
9 and they're stuck with the FIPA provisions -- earlier in the
10 case they tried to argue: We're not subject, MMLLC is not
11 subject to FIPA. I think they actually believed that when
12 they set this whole thing up and they thought, this is how
13 we're going to do it. I don't know if it works in California
14 or any of the other states they're in. It doesn't work here.
15 They have to disclose. That's it. There's a franchise
16 violation.

17 THE COURT: And the FIPA doesn't have a damages
18 section. But you would have to prove, obviously, economic
19 damages.

20 MR. BROWN: It has a restitution. It has rescission.
21 It has trebling in whatever damages you prove, Your Honor.
22 Their argument is kind of -- I don't really understand this
23 argument, if you read the statute and how it's constructed.
24 I know they like *Red Lion*, because the Ninth Circuit wasn't
25 dealing with that issue, and was dealing with a complete

1 unresolved issue that had nothing to do with this issue and
2 said: Oh, there's no remedies. Well, there's remedies all
3 over the statute. I guess they want you to shake your finger
4 at them, Your Honor, three times, treble. Bad franchisor.

5 THE COURT: But you also are claiming that you
6 deserve summary judgment on your Consumer Protection Act.
7 Aren't there other elements on the CPA claim?

8 MR. BROWN: Well, there are, but we think we've
9 proved them. Let's go through them. First of all, unfair
10 and deceptive. That's checked. Right? Public interest.
11 That's checked under the statute, too. The case law says one
12 thing and the legislature said, no, this is a public
13 interest. We've satisfied that.

14 So now what's left? Trade or commerce? Well, I don't
15 think anybody -- they're not going to argue this wasn't in
16 the trade or commerce. This wasn't a personal thing, this
17 was clearly a business in 35 states, 175 franchisees. And
18 Mr. Brewer is doing business.

19 Mr. Brewer is injured. We allege Mr. Brewer overpaid on
20 these illegal charges. They're illegal under FIPA. He
21 overpaid them. They don't deny that. Another non-denial,
22 Your Honor, another admission by denial is that he paid
23 hundreds of thousands of dollars in excess on these markups.
24 So, there's clearly damage.

25 I think it's Perrag -- what's the case -- the *Panag* case

1 in Washington talks about damages. Frankly, if you pick up a
2 phone and call a lawyer, Your Honor, that's damages. I mean,
3 damages is almost presumed under the CPA, to be honest. But
4 we have way more than that allegation. And again, they don't
5 go through and say, well, Mr. Brewer didn't pay anything on
6 these extremely marked up printing costs over the years. He
7 paid hundreds of thousands of dollars on just those alone.
8 So clearly he's been damaged.

9 And the fifth one is, is it proximately based upon the
10 wrongful conduct? Well, yeah, if they hadn't marked it up
11 illegally, he wouldn't have paid it. So, I think we meet all
12 those.

13 Their defense to this, rather than take on any of those
14 facts, which are so obvious, Your Honor, they say: Well you
15 didn't say those words, Mr. Brown, in your brief. You just
16 said you're liable under CPA. And you didn't go through and
17 explain how this would be in trade or commerce.

18 Well, I'm sorry, Your Honor, we only have so many pages in
19 these jurisdictions. And I wouldn't think we need to waste
20 time on that. But if the court needs more briefing, Your
21 Honor, we can supplement this in a day. I could probably
22 supplement it by the end of the day. I mean, it's pretty
23 obvious.

24 So the CPA has also been established. And they have
25 different remedies, right? FIPA gives you treble damages

1 possibility. CPA gives you treble damages, but limited to an
2 amount. Attorneys fees are not mandatory under FIPA. You
3 get some other remedies under FIPA that you wouldn't get in
4 CPA. You get the equitable remedies. You get rescission. You
5 get all kinds of things. So there's clearly remedies.

6 And we're not here about remedies, though, right? That's
7 another point, Your Honor, this is not a motion about
8 remedies. This is a motion about liability. We'll be
9 dealing with that, trust me, as this case goes forward, what
10 the remedies are and what Mr. Brewer elects as his remedies.

11 I guess really that takes us down to what real defenses do
12 they have that they raise in the motion, besides what you and
13 I just talked about? And I'd say they raised laches. I
14 don't know if I really have to address laches. We addressed
15 it in the brief. They don't allege prejudice, I guess their
16 prejudice would be over this lawsuit, which is never
17 sufficient prejudice to justify laches. You have to have a
18 different kind of prejudice. Otherwise it would always be
19 laches, every time. You sue me tomorrow. Oh, that's laches,
20 I'm now in a lawsuit.

21 Statute of limitations. They cite an unpublished case for
22 the proposition, which has also the language that we cited,
23 which we relied on, and other cases that said: Look, you hid
24 it from us. Trust me, Your Honor, I would have been here two
25 years ago with this motion if I had that document that we now

1 have. They wouldn't give it to us. And I'm sure you recall,
2 Your Honor, I was standing right here, we argued about this
3 and I said: We think they're doing this. We can't prove it
4 yet, but we're going to get this discovery.

5 And we have new counsel now, and we've got the discovery,
6 and there's the document. They don't say that document was
7 something else. They don't say, oh, it was a marketing tool
8 or it was a pro forma. No, they just let it sit there and
9 say, yep, we're marking it up, we're shoving our overhead in
10 there and other costs in there, because we provide this super
11 service, this super-secret service.

12 I don't know if that's true or not. But it doesn't matter
13 under FIPA. They can't get away from it on that. *Nelson*
14 doesn't allow that. None of the case law allows that.

15 THE COURT: Mr. Brown.

16 MR. BROWN: Yep.

17 THE COURT: I think I'm going to give my court
18 reporter a little rest now and have you deal with the rest in
19 rebuttal.

20 MR. BROWN: Yep, that would be great, Your Honor.

21 THE COURT: The court reporters love me because I
22 take care of them.

23 Okay. Mr. Alexander. And you'll win a lot of points if
24 you just slow it down a little bit.

25 MR. ALEXANDER: I will do my best, Your Honor.

1 THE COURT: He was fast, wasn't he?

2 THE COURT REPORTER: Yes, Your Honor.

3 MR. ALEXANDER: Mr. Brown summed up their summary
4 judgment motion as FIPA requires markups. And because there
5 were undisclosed markups, you have a violation of FIPA and
6 they're entitled to damages. That's simply not the law and
7 it's not supported by the facts of this case.

8 Details matter. The very detailed declarations that came
9 in from Mr. Martin, who was the director of plant operations,
10 as well as the declaration from Ryan Carr, the CFO for Money
11 Mailer FC, Money Mailer LLC, and even Money Mailer Holding
12 Corporation, goes through a very detailed explanation of what
13 their actual costs were to get to what? An end product.

14 Money Mailer's system is based around providing an
15 envelope filled with advertisements that will correctly go to
16 over 1,400 zones. And as Mr. Carr described it, it is over
17 500 million advertisements that go into those mailings each
18 and every mailing, 12 during the year. So we're talking
19 about billions of advertising across over 175 franchisees, 35
20 states, culling all that information, putting it together, in
21 what Mr. Martin describes is a very detailed process by which
22 they create the printing plates that are then given to Trend
23 Offset to execute the printing.

24 Trend Offset was able to do so several years after
25 Mr. Brewer became a franchisee, by the way. But Trend Offset

1 was able to do so after extensive investment training from
2 Money Mailer as to their entire integrated system that allows
3 this franchise to work.

4 And Mr. Carr's declaration is unrebutted that Money Mailer
5 had certain costs that were actual costs in producing those
6 mailings, and that they were very close to what they were
7 charging Mr. Brewer. If you look at his declaration,
8 particularly paragraphs 18 through 24, and he actually
9 provides the backup data to support those, as well as
10 schedules to do the math. We can see that of course there
11 were markups. We don't shy away from markups. That's how
12 businesses are conducted. There has to be some value that
13 they're adding to the franchises. And then they're paid for
14 that.

15 THE COURT: But what about disclosure?

16 MR. ALEXANDER: Sure. I say that the facts
17 demonstrate, rather, that there is adequate disclosure under
18 the FDD, under all of the various pieces of information that
19 were given to Mr. Brewer, under his research prior to
20 joining. The FDD is interesting. It discloses fully who all
21 the players are. Money Mailer Franchise Corporation, as the
22 franchisor; Money Mailer LLC as the operations company; Money
23 Mailer Holding Company, that is the parent to both of those
24 entities. It fully discloses that the money Money Mailer
25 makes is derived almost entirely from Money Mailer LLC, the

1 operations of the business. And it indicates that in Item 8
2 of the FDD.

3 It even is so precise as to say, you're going to have
4 fixed costs and variable costs, printing and art costs that
5 are going to be in addition to the fixed costs, about 115 per
6 spot, for you to carry out this business.

7 As it turns out, Mr. Brewer paid far less than that.
8 There were economies that were built into it, and those
9 savings were passed on to the franchisee. What we have to
10 establish today is that there are disputed issues of fact as
11 to every element of the claim that would be required for them
12 to win judgment against Money Mailer. And so the law is
13 incredibly important and it's been misstated. But the law is
14 important as to what's being alleged today.

15 They are alleging violations of two provisions of Section
16 180 of the Franchise Act, which is called the Bill of Rights,
17 for shorthand. The two provisions are: One, you have to
18 sell goods and services at a fair and reasonable price.
19 That's under Subsection D. Then Subsection E says: If
20 you're obtaining any benefit from a third party, you have to
21 disclose that benefit. They did all of that.

22 There cannot be just a mere statement from Brewer: I
23 found an internal document that says the printing costs are
24 \$44.53 -- I'll throw out as one of the examples -- that is a
25 fully burdened printing cost. They're actually charging me

1 over \$95. Wow, that is 110 percent markup. He is
2 incompetent to provide that kind of evidence, because he has
3 no idea what that line in that PowerPoint presentation even
4 means. And that was fully disclosed as a part of the
5 declarations from Mr. Carr and Mr. Martin.

6 There is a printing cost that first the LLC kind of
7 carried out, then Trend Offset carried out, to actually
8 physically print out the product. Then there's an insertion
9 charge.

10 But beyond that, there are all sorts of expenses and costs
11 that get us to the final product, and that's what this is all
12 about. How much are we charging you to have your stack of
13 envelopes that you can send to your zones? All of that
14 information was adequately disclosed. The question is
15 whether it's a fair and reasonable price, not did it have a
16 markup.

17 And certainly *Nelson*, nor the legislature, even implied
18 that 20 percent was somehow a per se line in the sand, above
19 which you would have a violation of FIPA. In fact, we cited
20 to the legislative history that said specifically, we're not
21 setting such a line. There has to be a determination of what
22 the market is setting for these goods and services.

23 THE COURT: So are you saying the Supreme Court's
24 decision in *Nelson* is just flat out wrong, that it didn't
25 take account of legislative history? Or are you saying it's

1 a distinguishable case?

2 MR. ALEXANDER: I'm saying it's a distinguishable
3 case. I don't think *Nelson* even attempted to try to pass a
4 ruling on a 20 percent markup. There is not enough
5 information from the court's decision, as well as the record
6 that we could see, as to why 20 percent was excessive or an
7 unfair and unreasonable price.

8 We can sort of guess to that, because what was being
9 provided in *Nelson* was basic pizza ingredients. And by the
10 way, Mr. Brown is wrong, the franchisees did not know what
11 the price was. They were told that after they got their
12 first bill, which was after they signed their franchise
13 agreement. Then they realized, oh, they're slapping on a
14 20 percent markup to ordinary old, you know, dough, and other
15 ingredients for the pizza. And the court took particular
16 note of that.

17 And then the rationalization was, well, this 20 percent,
18 really it's a franchise fee. And the court said, no, you
19 can't just change the character of that payment. There
20 wasn't a discussion as to 20 percent in and of itself sets
21 the mark for what is unfair and unreasonable.

22 THE COURT: So you're saying it's always going to be
23 a fact issue about whether the costs are reasonable, not
24 whether you failed to disclose what the markups were?

25 MR. ALEXANDER: Correct. The first inquiry has to

1 be, is it a fair and reasonable price? And then, did you
2 receive something in benefit that you didn't disclose to the
3 franchisee? Well, they disclosed fully what the costs of
4 those printings would be, and what Money Mailer LLC would be
5 obtaining for providing those services.

6 They used the term "kickback". There are no kickbacks in
7 this case. There's been zero evidence of it. A kickback is
8 when a vendor charges the buyer a certain price, and then
9 pays back to the buyer a certain amount of money. Kickbacks,
10 of course, are illegal because they avoid taxes. There's all
11 kinds of reasons why the law has a problem with kickbacks.

12 What they point to -- and of course they don't show you
13 the language, they just say: Oh, and Trend Offset, their
14 contract even had evidence of a kickback. No. That merely
15 said that there would be volume discounts. The more you
16 print, the less it will be. And guess what? They passed
17 those savings on to the franchisee.

18 Mr. Brewer, in fact, benefited from that. The more you
19 print, the less it will cost for those printings. That's why
20 the price went down from \$115 per spot, all the way down to
21 what he was paying, which was in some cases \$94, some cases
22 \$88. And you can see that from looking at the math in
23 Mr. Carr's declaration. So he clearly was receiving the
24 benefit of the lower costs.

25 Volume discounts are not kickbacks. There was no money

1 being paid back from Trend Offset to Money Mailer. There was
2 no money being paid from Money Mailer LLC to Money Mailer
3 Franchise Corp. They provided the services. Money Mailer
4 Franchise Corp provided the franchise and required the
5 royalties. They were separate fees. They were collected
6 separately. So there isn't a disclosure issue here at all.

7 What this boils down to is really Mr. Brewer just didn't
8 run his franchise in a way that would have ensured success.
9 He didn't charge enough for his spots. And he didn't sell
10 enough spots. When you have the price structure that's fully
11 disclosed under the FDD, it's very apparent that this is what
12 you're going to pay in terms of getting this end product out
13 the door. And if you sell more ads or sell your ads for
14 more, everything above that is more and more profit to
15 yourself. And he just simply didn't do that.

16 So as Mr. Carr described, you know, he could have -- we
17 didn't -- Money Mailer did not earn much, if any, profit on
18 him. It was perhaps 3 percent in some months. And he gave
19 another extreme example of 15 percent. The whole operation
20 makes between 2.2 and 5 point -- I think it was -- I'm
21 blanking on the number, 5.8 perhaps in total profit on the
22 entire enterprise. So this isn't a matter of where they're
23 just trying to put all of this on the backs of the poor
24 unsuspecting franchisee. They were fully aware of
25 everything.

1 THE COURT: If there is a franchise, a FIPA
2 violation, is it a per se CPA violation? And if not, what
3 elements of the CPA do you contest?

4 MR. ALEXANDER: Correct. 180 is very clear, and it
5 fits beautifully with the CPA Act 19.86, that if there is a
6 violation of the Bill of Rights, then you have the unfair or
7 deceptive practice. So you've met one of your elements of a
8 CPA claim.

9 But you still have to establish the remaining four
10 elements of your CPA claim. The way that 190 is structured,
11 it's very clear, Subsection 1, if you've got a violation of
12 180, it's a CPA claim. Period. End of story. If you have
13 other violations of FIPA, they fall under Subsection 2. And
14 there are different remedies. They're treated a little bit
15 differently.

16 All the case law that we've seen, *Nelson*, the Ninth
17 Circuit, your colleague on the bench, Judge Robart in the
18 Volvo case, looked at that and said, yeah, you've got to make
19 sure you establish every element. If you only find an unfair
20 and deceptive practice, does not mean that you've found a CPA
21 violation. You've got to establish the rest of the elements.

22 THE COURT: Okay. Thanks, Mr. Alexander.

23 Are you ready for Mr. Brown?

24 THE COURT REPORTER: Yes, Your Honor.

25 MR. BROWN: Counsel didn't answer your question, Your

1 Honor. You asked what elements are they contesting. We
2 don't know from their briefing, we don't know from the answer
3 to the question, he just said you've got to prove them. I
4 stand by what I said earlier, which is, what's there left to
5 prove in light of what we alleged and what they haven't
6 responded to?

7 I know you don't do this, Your Honor, but a lot of what
8 Mr. Alexander said is not in declarations. A lot of it was
9 argumentative, facts, with quotes around it, because they're
10 not supported. But I will say this. Mr. Carr's declaration,
11 there's an Exhibit 4 to it, Your Honor, and it talks about
12 this idea that, well, the markup isn't as high as we said it
13 is. Well, he's right. The billing to Mr. Brewer on that one
14 that allegedly was picked out of a hat, you know, and said
15 was \$72,000 and some change, almost \$73,000, and he said the
16 costs were only \$62,000 to them.

17 And you're like, well, that's only a \$10,000 -- it's
18 actually about a \$10,500 markup. But, again, if you look at
19 that exhibit, guess what they shoved in there? \$13,000 of
20 overhead. You know, if I wanted to put my building, and the
21 Christmas party for the firm, Your Honor, and the pens and
22 papers, and the rental of all of the FAX machines, and
23 everything else we do, bonuses, all my overhead into printing
24 costs that are a line item on a charge, and say, that's where
25 I'm going to put all my overhead, I don't know how that's not

1 a failure to disclose. Because he says they disclosed
2 everything.

3 We allege they never told us anything about that. And
4 where in Mr. Carr's ten-page declaration, or in Mr. Martin's
5 ten-page declaration do one of them ever utter the words:
6 "Yes, we did. Yes, I did."

7 THE COURT: What about Mr. Alexander's argument that
8 if the costs are ultimately reasonable, there is no violation
9 here, it needs to be both non-disclosed and unreasonable?

10 MR. BROWN: That's not what the law says. That's not
11 what *Nelson* says, for sure. *Nelson* is very clear. Failure
12 to disclose is a violation. That's the very purpose, right?
13 It's the idea, before you suck in the franchisee, you've got
14 to disclose everything, as I quoted the language to you
15 earlier, Your Honor, about the balance of power.

16 I mean, *Nelson* actually uses pretty good language about
17 the inequities here, and they have all the power and
18 knowledge. And Mr. Brewer and any other franchisee has no
19 bargaining position. Take it or leave it, right? They're
20 not begging him. Well, they might have in this case because
21 he actually took over a corporately run system.

22 I think it's kind of funny that they mention -- they
23 always want to hammer Mr. Brewer. He didn't charge enough.
24 He charged what they were charging, Your Honor, when he took
25 it. What's he supposed to do, go to the dry clearer and say:

1 Hey, I'm the new owner, they were charging you \$50, I'm going
2 to charge you \$100. Oh, and I'm also supposed to grow it.
3 Well, he grew it 50 percent. They said he needs to grow it
4 another 50 percent. Their argument is, if he had just been a
5 great enough businessman, Your Honor, he would have made
6 enough money, this never would have been an issue, we never
7 would have been found out. He would have made some profit
8 and it would have been okay.

9 Well, that's not the standard. The way they want to read
10 FIPA, reads FIPA right out of FIPA. There is nothing left.
11 I mean, there is nothing there when they say: Hey, we've
12 done everything we had to. We were totally up front. The
13 kickback provisions that we're getting better deals after the
14 fact, well, Mr. Brewer is not there any longer, Your Honor,
15 so whatever benefits they're getting, he's not getting them
16 from this provision. He wasn't told about it. He wasn't
17 given the option to say: Did you understand that for every
18 dollar you're going to pay for printing costs, they're going
19 to charge you another dollar, dollar-fifty? Would you have
20 signed up for that deal? FIPA says, no, too bad, that's
21 illegal. It's improper. Can't do it.

22 More importantly, all those things he said that Mr. Martin
23 says in his ten pages of declaration, Your Honor, about again
24 the great proprietary system of how the insertion, and the
25 shipping -- well, those are all line item charges we already

1 get. All that sounds like overhead. We developed this
2 process. Overhead. Good. You developed these processes.
3 It's overhead. If you want to shove it in printing costs
4 that you represent is the cost of printing that we're being
5 charged, and we went out -- unquestioned, they don't deny it
6 -- we went out and got the best rates possible. We used to
7 do it in-house, but now we've got even better rates. You
8 know, they're going up a little bit, you know how the world
9 is. Mr. Brewer is not told: Oh, printing costs are only
10 half of that, the rest is our overhead, and, you know,
11 Mr. Craciun's bonus, and whatever else is going on in the
12 company. That's not fair, Your Honor, and that's what FIPA
13 is about, it's all for the benefit of the franchisee.

14 The last thing I would say is, I'm not saying *Nelson* is
15 the clearest case in the world. But you know what *Nelson*
16 didn't say -- and this is the Supreme Court, this isn't some
17 unpublished Court of Appeals decision -- *Nelson* didn't say,
18 oh, based on the evidence at trial, the trial court was
19 correct that there was sufficient evidence to justify it.
20 That's not what they said. *Nelson* went a lot further than
21 that. And they didn't use a dollar amount, which makes
22 sense, they used a percentage.

23 But even if you said, I don't know if 20 percent is really
24 per se unfair, although I think that's what *Nelson* says,
25 whether we think it's weird or not, that's not for us to

1 decide actually, because they are the highest speaker on
2 state-law interpretation. How can any reasonable fact
3 finder -- if we're going to talk about fair and just --
4 forget the disclosure, which I think they're dead in the
5 water, that's all you need to do -- how would any factfinder
6 say that 110 to 150 percent undisclosed markup that is not
7 printing costs, not fixed costs, it's your overhead and other
8 things, how would that be fair and reasonable? How would any
9 factfinder find that?

10 Courts don't use it very often, Your Honor, but they
11 should, which is, no reasonable factfinder would find that's
12 reasonable. Nobody would find that you marking it up that
13 much and not telling someone about it makes it fair and
14 reasonable. They took that away from Mr. Brewer. And that's
15 what FIPA says you can't do. You should have gave them the
16 choice. Then we'd have a different situation. Hey, it's a
17 service fee. Hey, it's a royalty fee. It covers our
18 overhead. This is what we do to make money. They didn't do
19 that, Your Honor.

20 Any questions, Judge? I'd be happy to answer them.

21 THE COURT: No, I'm good. Thank you. I appreciate
22 it. And I know that we also have Mr. Brewer's motion for a
23 brief continuance of the trial date and related deadlines,
24 that just became fully briefed last week. And I will get a
25 ruling out on both those matters this week. Okay? So you

1 will be told where we stand at the end of this week. Okay?

2 Thanks very much, counsel. Appreciate it.

3 (Adjourned.)

4
5 C E R T I F I C A T E

6
7
8 I certify that the foregoing is a correct transcript from
9 the record of proceedings in the above-entitled matter.

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12
13 */s/ Debbie Zurn*

14 DEBBIE ZURN
15 COURT REPORTER
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